70-88

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1898

S & E CONTRACTORS, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Claims

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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CITATIONS

COURT DECISIONS:

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PRELIMINARY STATEMENT

This brief is filed by the American Bar Association as *amicus curiae*, pursuant to the written consent of the Petitioner and Respondent which are on file with the Court.

OPINION BELOW

The opinion of the Court of Claims and the two dissenting opinions are reported at 433 F.2d 1373 and are also reproduced at pages 45 through 97 of the Parties' Joint Appendix. It was a 4-3 decision.

QUESTIONS PRESENTED

This controversy concerns whether the Court of Claims has correctly read and applied the "Wunderlich" or "Anti-Wunderlich" Act,[1] 41 U.S.C. §§ 321-22. That Court extended to the Government the same right to obtain judicial review of Government procurement agency decisions favorable to contractors under the standard Government contract "Disputes" clause, as that Act affords contractors who are aggrieved by such agency decisions. The Court of Claims in this case has thus opened the door to full judicial review of the decision of the Government procurement agency, the Atomic Energy Commission, favorable to Petitioner, even though the Atomic Energy Commission has never repudiated or disavowed it.[2] Thus the questions presented include the following:

1. Does the Wunderlich Act require that the courts accord the Government judicial review of

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[1] So popularly named because of its legislative purpose to overturn the decision of this Court in *United States* v. *Wunderlich*, 342 U.S. 98, 96 L.Ed. 113 (1951). See, *e.g.*, H.R. Report No. 1380, 83d Cong., 2d Sess. 1 (1954) ("The purpose of the proposed legislation, as amended, it to overturn the effect of the Supreme Court decision in the case of *United States* v. *Wunderlich* (342 U.S. 98), rendered on November 26, 1951, under which the decisions of Government officers rendered pursuant to the standard disputes clause in Government contracts are held to be final absent fraud on the part of such Government officers.")

[2] The Commission's decision was administratively set at naught by the Comptroller General who ruled Petitioner was not entitled to recovery on its claims and that the Commission decision to the contrary was not entitled to finality under the Wunderlich Act, with the result that the Commission's decision was never implemented by any payment to Petitioner. 46 Dec. Comp. Gen. 441 (1966). In the court below the Department of Justice asserted the same conclusion on its own behalf. See dissenting opinion below of Judge Skelton. The Parties' Joint Appendix at p. 61 *et seq.*

Government procurement agency decisions favorable to contractors under the standard "Disputes" clause, coextensive with that made available to contractors by that Act?

2. Does the standard "Disputes" clause of Petitioner's contract, consistent with the Wunderlich Act, make Government procurement agency decisions under that clause favorable to Petitioner binding on the Government so as to foreclose judicial review thereof under the criteria of that Act?

3. Does the decision of the Atomic Energy Commission favorable to Petitioner under the standard "Disputes" clause of Petitioner's contract constitute or amount to a contractual agreement on, or settlement of, the dispute that is binding on the Government, irrespective of the Wunderlich Act, in the absence of allegations of fraud, bad faith, or illegality?

4. Do the answers to the foregoing depend on whether the Government procurement agency has, or has not, as in this case, disavowed, repudiated, or refused to carry out its decision favorable to Petitioner?

THE STATUTES AND CONTRACTUAL PROVISIONS INVOLVED

1. The Act of May 11, 1954, 68 Stat. 81 (The Wunderlich Act), 41 U.S.C. §§ 321-322) provides:

> "§ 321. *Limitation on pleading contract-provisions relating to finality; standards of review.*
>
> "*No provision of any contract* entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized repre-

sentative or board in a dispute involving a question arising under such contract, *shall be pleaded* in any suit now filed or to be filed *as limiting judicial review* of any such decision *to cases where fraud* by such official or his said representative or board *is alleged: Provided, however,* That any such *decision* shall be final and conclusive unless the same is fraudulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. (Emphasis added.)

"§ 322. *Contract-provisions making decisions final on questions of law.*

"No Government contract shall contain a provision making final on a question of law the *decision* of any administrative official, representative, or board." (Emphasis added.)

2. The standard "Disputes" clause of Petitioner's contract provided as follows:

"*Disputes*

"(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer *shall be final and conclusive* unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission or its duly authorized representative for the determination of such appeals *shall be final and conclusive* unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as

necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. *Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.*

"(b) This 'Disputes' Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law." (Emphasis added.)

3. The pertinent provisions of the Budget and Accounting Act concerning the General Accounting Office, 31 U.S.C. §§ 71, 74, 82d, and of the statutes relating to the Department of Justice, 28 U.S.C. §§ 516, 519, are set forth in Appendix A hereto.

THE INTEREST OF THE AMERICAN BAR ASSOCIATION

The American Bar Association strongly urges reversal of the decision below in this case.

By overturning some 45 years of administrative practice of according finality to decisions of procurement agencies favorable to contractors, the decision below appears to threaten the process of settlement of disputes between the Government and its contractors, and to undermine the finality of settlements made (absent allegations of fraud, bad faith or illegality). Because of the vast scale of Government procurement and the obvious public importance of encouragement of the settlement of Government contract disputes, the

American Bar Association urges the Court to reverse the decision below.

The bases of these concerns are illuminated by the dissenting opinions below. Thus, Judge Collins wrote in part:

> "A brief look at the realities of the disputes procedure reveals that Congress could never have intended that the [Wunderlich] Act be read as the court reads it. When a dispute arises between a contractor and the Government, the 'disputes' clause sets out clearly the procedure to be followed. First, the parties may voluntarily settle the dispute. If they do, that is the end of the matter. If no settlement is reached, the disputed matters are decided by the agency's contracting officer. If the contractor does not appeal to the agency from the contracting officer's decision within the prescribed time, that, again, is the end of the matter. If, however, the contractor does appeal to the agency, then, according to the court, a decision rendered by the agency or its board favorable to the contractor is not the end of the matter; the agency is free at any time to disavow or repudiate its own decision, thereby forcing the contractor to sue. *The anomaly created by the court's decision is too obvious to need elaboration.* While an agency will still be bound by the decisions of its contracting officers, it will not be bound by decisions made at the highest level." (See Parties' Joint Appendix, pp. 93-95; emphasis added, footnotes omitted.)

Judge Collins' dissent next pointed out an example of the mischief of the Government's disavowal of its decisions favorable to contractors:

> "The suggestion that the Government, after deciding a contract dispute with one of its contractors in favor of the contractor, can then

promptly disavow that decision carries with it an enormous potential for mischief. It means that the Government, after deciding that its contractor's claim is meritorious, based on a *preponderance* of the evidence presented to it, can then turn around and reject the claim because there is *substantial* evidence (*i.e.*, less than a preponderance) to support the opposite result. The majority opinion puts a tremendous economic burden on Government contractors who are now faced with the prospect of prolonged judicial proceedings in order to collect funds to which the agencies have already found them entitled. After today's decision the Government would be foolish to pay *any* board awards." (*Id.* at 95; emphasis in original.)

Finally, Judge Collins notes the devastating effect of the court's having destroyed the finality of agency board decisions favorable to contractors:

"Moreover, the court's decision will utterly defeat the purpose and utility of the 'disputes' clause, which has served admirably over the years, and will seriously hamper the Government in virtually all its activities whenever it is forced to call on the resources of private firms. The purpose of the clause has been to promote the expeditious performance of Government contracts. By destroying the finality of board decisions favorable to contractors, the court has assured that the performance of Government contracts will be anything but expeditious. Protracted and expensive litigation has never been known for its beneficial effect on contract performance." (*Id.* at 96.)

Also pertinent to the interest of the American Bar Association as *amicus curiae* is the concern over the role played by the Department of Justice in this case as expressed by the dissenting opinion of Judge Skelton, joined by Chief Judge Cowen and by Judge Col-

lins, who wrote in part (See Parties' Joint Appendix, p. 81):

> "The Attorney General, in effect, urges that the parties here are entitled to their 'day in court' on the finality issue and on the merits. At first blush, this is appealing to the American sense of justice and fair play. However, when it is applied to the facts and procedures in this case, it loses its appeal. The plaintiff does not want a hearing in court. All he wants is the enforcement of the decision and to be relieved of interdepartmental squabbling over powers and duties. The AEC, the only other party to the suit, has had the questions involved in the case heard *four* times already, by those authorized by the contract to hear them, namely, the contracting officer, the examiner and twice by the AEC itself, all of whom represented the Government. The AEC has not asked for a court hearing on whether or not its decision is final nor on the merits, and, if it could speak out, it would no doubt oppose it. That only leaves the Attorney General, who is not a party and who appears in the case as an attorney. He wants a hearing in court to enable him to assert a theory contrary to the decision of his client, the AEC. His argument is unpersuasive."

Judge Skelton then noted the harm to the disputes process from permitting the Attorney General to proceed on his own:

> "The effect of the majority opinion is to allow the Attorney General *sua sponte* to appeal from the decision of another executive agency adverse to the government for the purpose of overturning it, and, by dicta, authorizes him to similarly appeal from an adverse Board decision for the same purpose. Such a procedure imposes an additional layer of bureaucratic red tape that contractors must overcome before they receive final decisions

> along the administrative trail on their claims under the disputes clause in government contracts. It easily adds from one to three years, and perhaps more, to the already extended period of time for processing a contractor's claim. Under such a system, how can a knowledgeable contractor afford to do business with the government?" (*Id.* at 81-82; emphasis in original.)

There thus appears to be at stake large issues of public importance which also touch upon the business required to come before the Court of Claims and the other Federal courts in these times of clogged court backlogs. If this case can properly be viewed as one in which Petitioner and the Government acting through the agency empowered to contract with Petitioner have settled, or agreed upon, Petitioner's entitlement to recover on its claims, then this case (and others like it)[3] would appear to have no business in the courts on judicial review under the criteria of the Wunderlich Act. The interest of the American Bar Association thus suggests that this Court should determine that that Act does not require such an expenditure of judicial resources for the reasons indicated.

STATEMENT

In August 1961 Petitioner, as the lowest responsible bidder after formal advertising for bids, was awarded a contract by the Atomic Energy Commission to construct a testing facility at the National Reactor Test Station in Idaho. Under the original contract, the work was to be completed by February 6, 1962, and Petitioner was to receive $1,272,000 as the fixed con-

[3] We are advised that at least two other cases now pending in the court below raise substantially similar issues.

tract price. Various contract modifications increased the contract price to $1,364,794.70 and extended the work until March 25, 1962. Petitioner completed the work, and it was accepted by the Government in June 1962.

Petitioner submitted seven claims[4] under the contract to the Contracting Officer who denied all of them under the contract's "Disputes" clause.[5] Petitioner then appealed the denial of the claims to the Atomic Energy Commission which referred them to a Hearing Examiner of the agency for the holding of a hearing and the preparation of a report.[6] By decision dated June 26, 1963, the Hearing Examiner found that Petitioner was entitled to recover on the seven claims in issue. This decision was substantially affirmed by the Atomic Energy Commission itself on May 13, 1964, as shown by its Order entered that date which provided as follows:

> "The proceeding is remanded to the contracting officer with instructions to proceed to final settlement or decision in accordance with the decision of the hearing examiner dated June 26, 1963, as modified by our order of November 14, 1963, and by this decision."[7]

Indeed, this Order largely repeated the Commission's previous Order of November 14, 1963 directing the contracting officer "to effect promptly equitable ad-

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[4] Originally, Petitioner presented nine claims totalling approximately $1,950,000. Only seven of them were urged below.

[5] The text of this clause appears at pp. 4, 5, *supra*.

[6] At that time the Atomic Energy Commission had not established a Board of Contract Appeals to act for it on contract disputes.

[7] See Parties' Joint Appendix, p. 63.

justments and payments to which the Appellant [the Petitioner] is entitled."[8]

As shown by the report of the Commissioner to the Court of Claims (Parties' Joint Appendix, pp. 35-36), the following events ensued:

> "Subsequently, on March 4, 1964, a certifying officer in the employ of the Commission requested advice from the General Accounting Office ('GAO') with respect to the certification of a voucher for the making of a payment in the amount of $32,297.73 to the plaintiff under the contract. The amount set out in the voucher was said to represent three sums withheld from the plaintiff, *i.e.*, $22,280 withheld because the plaintiff allegedly owed such amount to a supplier of aggregate, $8,366.19 withheld because of the Government's possible liability to another contractor, and $1,651.54 withheld because of an alleged indebtedness by the plaintiff to still another contractor for telephone services.
>
> "It will be noted that the voucher which the certifying officer submitted to the GAO for advice covered two of the items that had been involved in the plaintiff's 'retainage' claim before the hearing examiner and the Commission (although there was a variance in the amount of one of these items), but it did not cover any proposed payment of any of the seven claims that are involved in the present review proceedings.
>
> "On December 5, 1966, the GAO advised the certifying officer in decision No. B-153841 (46 Comp. Gen. 441) that it would be improper to certify the voucher which had been submitted to the GAO, because (according to the GAO) the plaintiff did not have a valid claim for any additional compensation under the contract.

[8] See Parties' Joint Appendix, p. 35.

"The GAO reviewed at great length the hearing examiner's report and the Commission's actions on all of the plaintiff's claims, including the 'access,' 'concrete,' 'steam,' 'weather,' 'acceleration,' and 'backfill' claims, which are summarized in parts II-VII of this opinion. The GAO expressed the opinion that the administrative decisions favorable to the plaintiff in connection with these claims were not supported by substantial evidence.[9]

"Relying on the opinion expressed by the GAO, the Commission thereafter refused to take any further action on the plaintiff's claims. As a consequence, the plaintiff has never received the administrative relief which, according to the Commission's decisions, the plaintiff was entitled to receive on the claims described in parts II-VII of this opinion." (Footnote omitted).

Thereafter, on April 11, 1967, Petitioner commenced this action in the court below. On November 30, 1970, the court below decided that the Government was entitled to judicial review, under the criteria of the Wunderlich Act, of the merits of the entitlement decisions of the Atomic Energy Commission favorable to Petitioner on its claims. In its present posture below, the case is on remand to the Commissioner of the Court of Claims "for his consideration and report on the various claims under Wunderlich Act standards."[10] As pointed out in the Petition for Certiorari, as "a consequence of the Government's delay in payment in this case, the Petitioner has been unable to continue in business."[11]

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[9] The GAO further asserted that "The Examiner's decision contained serious errors of law." See Petition for Certiorari, App. C at C-47.

[10] See Parties' Joint Appendix, p. 61.

[11] See Petition for Certiorari at 10.

ARGUMENT

The Strongest Reasons of Public Policy Suggest That the Court Should Clarify the Roles of the Courts, the Contracting Agencies, the Department of Justice, and the General Accounting Office so as To Accord Contractual Finality to Disputes Clause "Decisions" or Settlements at the Agency Head Level Favorable to Contractors in the Absence of Fraud, Bad Faith or Illegality.

The Court should resolve the competing contentions as between the contractual finality to be accorded administrative settlements of contract disputes at the agency head level and payment thereon on the one hand, and the contention that Congress has mandated that such settlements (and payments) when resulting from decisions at the agency head level favorable to contractors should be made subject to judicial review at the Government's election (even by the Attorney General *sua sponte*).

Four judges of the court below were of the view that the Wunderlich Act and its history manifested a Congressional purpose to accord the Government the right to full judicial review of its own agencies' decisions under the criteria of that Act. Three judges of that court dissented from that pronouncement.

1. The Holding Below Has No Support in the Words of the Statute; the Wunderlich Act Was Only a Command to the Government Not To Plead the Disputes Clause as "Limiting" Judicial Review to Fraud Cases. It Conferred No Right of Judicial Review on the Government:

The holding of the court below that the Wunderlich Act confers a right of judicial review on the Government, coextensive with that conferred on the contractor, simply has no support in the language of the

statute. For the language of the statute does not purport to confer upon the Government a right of judicial review, or a right of refusal to pay contractors pursuant to Disputes clause decisions favorable to contractors. This is because such a decision, if accepted by the contractor, disposes of the dispute by agreement of the parties within the contemplation of the standard "Disputes" clause.[12] Rather, the only factual situation to which the statute, on its face, addressed itself, in its context of overruling this Court's decision in *United States* v. *Wunderlich,* 342 U.S. 98, 96 L.Ed. 113 (1951), was its command to the Government that "no provision of any contract entered into by the United States . . . shall be pleaded . . . as *limiting judicial review* . . . to cases where fraud . . . is alleged . . ." in a suit by a contractor on such a contract. (Emphasis added.)

Conversely, the contractor can never be in a position where, in a suit brought by him—which is all we are talking about—he could plead the disputes clause, and an implementing Board decision, as "limiting judicial review" to cases where fraud is alleged. Indeed, his objective is the very reverse. His objective, in a suit brought in the Court of Claims, under the Wunderlich Act, must necessarily be, not to *"limit"* judicial review, but to seek the fullest possible judicial review.

Stated otherwise, the only situation to which the statute is addressed, in its express purpose of delimiting the finality of disputes clause decisions, is the

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[12] In the present case, the agency decision favorable to Petitioner required implementation by the contracting officer "to proceed to final settlement or decision." See text at note 7 *supra et seq.* As there shown due to the intervention of the GAO such implementation did not take place.

situation where the contractor—and not the Government—seeks judicial review. Hence, it does not reach the point of purporting to confer a right of judicial review on the Government.

2. The Interpretation of the Wunderlich Act by the Court Below Is Anomalous Since It Accords Greater Contractual Finality to Decisions of Subordinate Contracting Officers Favorable to Contractors Than It Does to the Same Decisions Rendered at the Agency Head Level:

The standard "Disputes" clause as incorporated in Petitioner's contract[18] provides that, unless the contractor appeals from a decision of the contracting officer to the agency head within the time provided, that decision is final and conclusive as to questions of fact. The Wunderlich Act by its terms affords no basis for judicial review of contracting officers' decisions, in the absence of such an appeal first having been taken.

When the contracting officer and the contractor dispose of a dispute by agreement, there is ordinarily no occasion for the issuance of a decision by the contracting officer. Rather, the agreement resolving the dispute, if time or money are involved, is usually the subject of a contract modification executed by the parties. To such agreements (whether evidenced by a contracting officer's decision or by a supplemental agreement), the Wunderlich Act by its terms has no application. As pointed out in Judge Collins' dissent quoted above, the anomaly, created by the court below, becomes evident when the Wunderlich Act is read as enabling the Government to obtain judicial review of decisions at the agency head level favorable to

[18] See pp. 4, 5, *supra*.

contractors when, plainly, that course is not open to the Government when the contractor obtains the same favorable result at the subordinate contracting officer level. Stated otherwise, since a "Disputes" clause decision on a question of fact favorable to a contractor at the contracting officer level is contractually binding on the Government and the contractor, unless the contractor appeals to the agency head, it is nonsense to read the Wunderlich Act as denying any less contractual finality to the same decision rendered at the agency head level which is acceptable to the contractor. Moreover, as earlier indicated, such a decision rendered at the agency head level, when accepted by the contractor, disposes of the dispute by agreement of the parties within the contemplation of the standard "Disputes" clause.

3. To Refuse Payments Ordered as an Outcome of Appeal Proceedings Under the Disputes Clause Constitutes a Breach of Contract, Inasmuch as the Government Is Given No Contractual Right Under the Disputes Clause to Judicial Review of Decisions Favorable to the Contractor:

The entire procedure under the standard "Disputes" clause is contractual in nature, and the Wunderlich Act does not alter this fact since it was not a jurisdictional statute. It did not confer any additional authority on the heads of agencies, and it did not revise the basic jurisdiction of the federal courts.

Thus we necessarily fall back on the "Disputes" clause. And the "Disputes" clause in Government contracts represents a substantial departure from the traditional methods of resolving controversies between private parties, inasmuch as determinations under the clause are made by a representative of only one of the contracting parties—the Government. There is a noteworthy possibility of conflict of interest on the

part of such Government representative, which is inherent under the clause. This, however, has been justified, historically, not on any basis of sovereignty or public policy, but on the basis that the contractor has *consented* in the contract to the determination of disputes by the person designated in the clause. See *Kihlberg* v. *United States,* 97 U.S. 398, 24 L.Ed. 1106 (1878), and *United States* v. *Adams,* 74 U.S. (7 Wall) 463, 19 L.Ed. 249 (1868). The history of the clause also makes it absolutely clear that the only exceptions to the conclusiveness of the decision by the person designated in the clause—*e.g.,* a decision that was fraudulent, arbitrary, or capricious—were first expressed by the courts as an implied condition of the contractor's consent. This implied condition was deemed necessary to justify enforcement of a provision permitting a representative of one of the contracting parties to make the decision, and unquestionably was only for the contractor's protection.

In the clause in this case, the contractor consented to the determination of disputes by the contracting officer, and the *Commission* on appeal. Hence, the "Government's" disavowal of the decision made by its representative named in the contract to make such decision, is a breach of its contractual obligation. We submit that the contractor's consent to permit a specific representative of the Government to decide disputes —the Commission—should not be read as permitting any different representative of the Government to "veto" decisions rendered by the Commission which are in favor of the contractor in the absence of allegations of fraud, bad faith or illegality on the part of the Commission—none of which is alleged below.

In addition, the "Disputes" clause clearly contemplates that the contractor, not the Government, is to

be the moving party at each step in the procedures established by that clause. First, the contractor must present his claim to the contracting officer, and if the parties dispose of the dispute by agreement, that is the end of the matter. Under the "Disputes" clause there is no Government right of administrative appeal or right to judicial review of that agreement, or from any decision of the contracting officer not appealed by the contractor. However, if the contractor is aggrieved, he has the right to appeal to the head of the department, whose decision, or that of his authorized representative, is *"final and conclusive,"* subject only to the possibility that the contractor may seek judicial review of an adverse decision. This possibility is recognized in the clause which confers finality upon the decision of the head of the department, for it specifies the circumstances in which a court may overturn the decision, thus contemplating that it will be only the contractor—the moving party throughout the procedure—who will seek such judicial review.

Accordingly, the "Disputes" clause does not provide for a right on the part of the Government to judicial review, and a refusal by the Government to carry out a decision on appeal under that clause which is acceptable to the contractor constitutes a breach of that contractual provision. Such breach would then entitle the contractor to recovery without regard to review under the Wunderlich Act standards, inasmuch as that Act does not apply to actions for breach of contract. *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 16 L.Ed.2d 642 (1966).

As Judge Skelton stated in the portion of his dissent quoted at p. 8 *supra,* this procedure may appear —but at first blush only—to be one-sided and unfair.

More thoughtful study shows that it is not one-sided and unfair. First, the clause is prescribed by the Government and the contractor has to take it if he wants the contract. He has no choice on the matter. Second, the clause and its predecessors have been uniformly interpreted for over 45 years as conferring no right of judicial review on the Government. Third, the clause provides that the mechanics of review are to be invoked at the instigation of the contractor in each instance. Fourth, it is a designated representative of the Government—a party to the contract—who is the decision maker at each step. And fifth, as discussed below, the contractor is obligated by the contract to proceed with performance of the contract in accordance with the decision of the contracting officer.

The decision below has disregarded the breach of contract committed by the Government in this instance, and has thereby set at naught the entire contractual basis established for the resolution of disputes.

4. The Quid Pro Quo for the Contractor's Disputes Clause Promise To Give Up His Right of Contract Rescission and To Bear the Burden of Financing the Work in Accordance With the Contracting Officer's Decision, Is the Government's Disputes Clause Promise To Provide Speedy, Fair and Final Administrative Settlement and Payment Procedures, Subject to the Contractor's Right to Judicial Review:

When the contracting officer and the contractor are unable to settle a dispute by agreement and the contractor appeals the contracting officer's decision to the agency head, the contractor further agrees, "pending final decision of a dispute hereunder," to "proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

It is obvious that the duty so to proceed may impose a very substantial financial burden on contractors as when, for example, the controversy centers on whether the work is required by the contract specifications or should be paid for as extra work. It is equally apparent that the public interest in the accomplishment of Government procurement has long required that contractors be asked to relinquish most of their rights to contract rescission and suit in court for damages by agreeing to proceed with the work, notwithstanding the dispute, and to proceed in accordance with the contracting officer's decision.[14]

The *quid pro quo* to contractors for this relinquishment of the right of contract rescission and suit in court for damages and for bearing the burden of financing the costs of disputed work pending the administrative appeal has been the Government's promise to provide expeditious and fair procedures for the administrative appeal and final settlement of the dispute and payment thereon.[15] As stated by this Court,

> ". . . Pre-eminently, this policy [of utilization of the administrative procedures contractually

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[14] The standard "Disputes" clause has so provided since 1926. See Petrowitz, *Methods of Resolving Contract Controversies Pertaining to Government Contracts and Subcontracts: An Empirical and Analytical Study*, Senate Document No. 99, 89th Cong., 2d Sess. (1966) at 17.

[15] We have seen that the purpose of the Wunderlich Act was to enable contractors, notwithstanding the "Disputes" clause language, to obtain judicial review of agency decisions adverse to them.

The mutual understanding, implicit in the "Disputes" clause, that the contractor would proceed with the performance and financing of work that was the subject of dispute, in return for a prompt determination and payment (where appropriate) of its

> bargained for] is grounded on a respect for the parties' rights to contract and to provide for their own remedies. See *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 16 L.Ed. 2d 642, 86 S. Ct. 1545; *United States* v. *Moorman, supra*, 338 U.S. at 461-462, 94 L.Ed. at 259, 260. But, beyond that, there is also a belief that resort to administrative procedures is an expeditious way to settle disputes, conducive of speed and economy. *United States* v. *Blair, supra*, 321 U.S. at 735, 88 L.Ed. at 1043. Such procedures also facilitate a department's supervisory control over contracting officers and perhaps enhance the possibility of harmonious agreement. *Ibid.*" *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429, 16 L.Ed. 2d 662, 667 (1966). (footnote omitted.)

In addition, the decision of this Court in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 10 L.Ed. 2d 652 (1963), has largely eliminated, in the light of its interpretation of the Wunderlich Act, the contractor's previously understood opportunity, under the Tucker Act, to obtain a judicial trial in the Court of Claims of the factual issues decided adversely to him at the agency head level, thus substantially enlarging the finality of decisions under the standard "Disputes" clause favorable to the Government and correspondingly diminishing the rights of the contrac-

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claims, was also expressed by representatives of the contracting agencies and industry in the congressional hearings that led to the passage of the Wunderlich Act. Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st and 2nd Sess., 1953-1954, on Review of Finality Clauses in Government Contracts, pp. 4, 8, 13, 52, 92-93, 108, 116, 123, 132; Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 82d Cong., 2d Sess., 1952, on Finality Clauses in Government Contracts, pp. 39-40, 78-79, 91-92.

tor. One commentator, pointing out how the judicial remedies of Government contractors have thereby suffered, has written:

> ". . . The [C]ourt of Claims is powerless to reverse an agency decision even though it may be based on clearly erroneous conclusions of fact, because of the 'substantial evidence' test. This is the clearest example of how sovereign immunity has, in effect, been reimposed in a substantive sense . . .
>
> "In summary, the court review is more expensive and time consuming than a regular trial on the merits, and at the same time it is handicapped in its efforts to administer justice.
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> * * *
>
> "In summary, since *Bianchi,* the commitment to the disputes procedure of previously accepted rights has not been an unrelieved blessing. If there is an adverse decision by the agency (and two-thirds of the cases brought to the ASBCA, for example, fall in that category), the findings of fact are entitled to finality, and no further trial of the case is permissible. And if a claimant prevails he is entitled to only the limited agency relief prescribed by the particular clause (or anti-claims clause) on which the claims rest. Is this not a partial reimposition of sovereign immunity . . . ?"[16]

Obviously, then, if the dispute cannot be settled by agreement with finality at the agency head level and

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[16] Spector, *Contract Disputes and Remedies: Are Current Practices for Redress of a Contract Grievance Against the Government Fair and Efficient?,* 5 National Contract Management Journal 7, 10 (1971). The author is a Commissioner of the United States Court of Claims, and former Chairman of the Armed Services Board of Contract Appeals.

payment made by the Government thereon, the efficacy of the whole system of administrative adjudication and settlement of contract disputes is thrown into doubt, and perhaps into chaos as suggested by Judge Collins in his dissenting opinion below.[17]

5. The Request of the Attorney General to the Contracting Agencies To Screen Decisions at the Agency Head Level Favorable to Contractors for Conformity to the Criteria of the Wunderlich Act Coupled With the Decision of the Court Below, Pose Grave Risks to Contractors in Relying on the Finality of Disputes Clause Settlements and Payments Thereon:

On January 16, 1969, the Attorney General, in the course of an opinion to the Secretary of the Air Force, 42 *Ops. Att'y Gen.* No. 33, as to the effect to be given a decision of the General Accounting Office overruling a decision of the Armed Services Board of Contract Appeals favorable to the Government, stated that:

> "The contracting agencies should call to this Department's attention, on a continuing basis, appeals board decisions against the Government which they feel warrant litigation in accordance with the Wunderlich Act." *Id.* at 19.

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[17] See Parties' Joint Appendix, p. 97. That the Department of Defense views decisions of its Armed Services Board of Contract Appeals favorable to contractors as binding settlements under the "Disputes" clause is shown by the fact that since 1966 its regulations have provided that "Decisions of the Armed Services Board of Contract Appeals constitute decisions of the head of the department as referenced in the disputes clause standard in all Government contracts. It is expected that decisions favorable to the appellant in whole or part will be promptly implemented by payment at the contracting officer level . . . ." ASPR 1-314(g), 32 C.F.R. § 1.314(g) (1970). See Hearings on H.R. 474, *To Establish a Commission on Government Procurement*, 91st Cong., 1st Sess. 1813 (1969).

The Attorney General's opinion continued:

> "If an agency has policies or procedures which inhibit its officials from performing this function, it should reconsider them. A contracting agency may also wish to consider whether it should adopt affirmative procedures to facilitate the screening of board decisions." *Id.* at 21.

Finally, the Attorney General stated that:

> "Delay in payment to a contractor who has been successful before a board need not be occasioned by the procedures I have suggested. Payment in accordance with board decision might still be made, as it has in the past, subject to recovery by the Government if the decision is later determined by the courts not to satisfy Wunderlich Act standards." *Id.* at 21, 22.

From this it would appear that there will be substantial efforts zealously undertaken within the Government contracting agencies to persuade the Department of Justice (or the General Accounting Office) that disputes clause decisions at the agency head level favorable to contractors should be overturned or challenged on Wunderlich Act grounds. This invitation for subordinates of the agency head so to refer matters to the Department of Justice for appropriate action does not appear to be deterred by the fact that in the Department of Defense, as was done in Petitioner's case, decisions of the Armed Services Board of Contract Appeals are made "as fully and finally as might each Secretary" make them. 32 C.F.R. § 30.1 (1970).[18] The decision below, if not reversed by this Court, will give added impetus to efforts by agency employees to overturn the decisions rendered at the level of their agency heads with which they disagree and to prevent

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[18] In Petitioner's case the entitlement decisions favorable to Petitioner were made by the Commissioners of the Atomic Energy Commission.

payment on them. This is likely to breed a pernicious informer system, to open the door to disgruntled Government officials and duress and coercion of contractors in claims settlements, and perhaps to invite chaos in the Government contract field. Further, the decision below (viewed in the light of the Attorney General's opinion quoted above) would inject the Department of Justice directly into the administrative resolution of contract disputes where it is not contractually empowered to act. This would be a result which also has no statutory or contractual authorization, and which, by ex parte, anonymous second-guessing of decisions at the agency head level, would contravene the procedural fairness requirements of the "Disputes" clause. Obviously, unless corrected by this Court, all this poses grave risks to contractors (and posed a fatal one to Petitioner) in relying on the finality of "Disputes" clause settlements and payments thereon.

6. The Wunderlich Act and Its History Disclose No Congressional Purpose To Authorize Anyone To Overturn Disputes Clause Decisions at the Agency Head Level Favorable to Contractors:

Prior to the enactment of the Wunderlich Act of 1954, the rare efforts by the Government, at the instance of the General Accounting Office or otherwise, to overturn agency decisions favorable to contractors under the standard disputes clause met with virtually no success in the courts.[19] And so far as the General Accounting Office is concerned, the legislative history of the Wunderlich Act clearly indicates that the Congressional purpose was not to change the jurisdiction of the General Accounting Office in any way, but to

[19] See the cases cited in Judge Collins' dissenting opinion below, Parties' Joint Appendix, pp. 90, 91 and at footnote 5 thereto.

leave it free to exercise its own statutory authority, as the same existed prior to the *Wunderlich* decision.[20]

Although the precise parameters of this authority, existing in the General Accounting Office before the Wunderlich Act, are nowhere spelled out in definitive form, the legislative history of that Act indicates a widely held understanding that the General Accounting Office's role was restricted to a review of the legal propriety of payments to determine whether there had been fraud or overreaching, and that the General Accounting Office had no authority to reverse decisions of the contracting officer or the heads of Departments under the "Disputes" clause.[21]

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[20] H. Rep. 1380, 83d Cong., 2d Sess. at 6-7 (1954):

"The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.

"The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office. It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill. At the same time there is no intention of setting up the General Accounting Office as a Court of Claims. . . ."

[21] Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st and 2d Sess., 1953-1954 on Review of Finality Clauses in Government Contracts, pp. 94, 109-111, 118, 132, 138-139.

As stated by the Attorney General in his opinion dated January 16, 1969, 42 *Ops. Att'y Gen.* No. 33:

"Precisely what that independent authority [of the General Accounting Office] was or should be was a controversial ques-

Moreover, nothing in the history of the enactment of the Wunderlich legislation discloses any Congressional purpose of authorizing the Government procurement agencies or the Department of Justice to repudiate decisions favorable to contractors at the agency head level on grounds that they might not conform to the criteria laid down by that Act for judicial review available to contractors aggrieved by agency decisions favorable to the Government. Instead, the legislative history of the Wunderlich Act shows that representatives of both Government and industry informed Congress that in order for contractors to obtain bonds and financing for the performance of disputed work, and to insure the bankability of their contracts, it was essential that administrative finality attach to decisions and settlements under the "Disputes" clause favorable to contractors.[22] Clearly, that legislative history shows no Congressional intent to establish a system requiring procurement personnel within the agencies to second-guess decisions made at the agency

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tion, as to which Congress deliberately avoided making any decision in the Wunderlich Act. While the legislative history contains some conflicting statements, on balance it does indicate that that Congress did not intend to set GAO up as an additional layer of administrative appeal for contractors on disputes questions. The House Report on the bill eventually enacted states that 'there is no intention of setting up the General Accounting Office as a "court of claims."'" *Id* at 12, 13. (Footnotes omitted.)

See also Judge Collins' dissent, Parties' Joint Appendix, p. 90, footnote 3. The relevant statutes pertaining to the General Accounting Office and to the Department of Justice are set forth in Appendix A, *post*.

[22] Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st and 2d Sess., 1953-1954, On Review of Finality Clauses in Government Contracts, pp. 54-55, 92-93, 116; Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 82d Cong., 2d Sess., 1952, on Finality Clauses in Government Contracts, p. 121.

head level with its resultant adverse impact on the financing of Government contracts, and on the willingness of contractors to continue to proceed with the contract work, and finance it, in accordance with the decision of the contracting officer, pending the administrative appeal. With respect to the Department of Justice, it is apparent from the legislative history, that this Department (the only agency that consistently opposed the enactment of any remedial legislation) was to have no role whatever in the "Disputes" clause process, other than to act as the Government's attorney after a contractor filed suit in the courts.

On the contrary, as set forth in Point 1 hereof, the Wunderlich Act, by its very terms, only addressed itself to the situation where the contractor brings judicial review. This, in turn, is the setting of its legislative history.

7. Reversal of the Decision Below Will Not Diminish or Impair the Government's Power To Recover Illegal Contract Payments:

We do not suggest that actions under the "Disputes" clause favorable to contractors necessarily override the power of the Government to recover public funds illegally paid. Nor do we intimate that, in appropriate circumstances, responsibility for initiating such recovery may not properly fall to the General Accounting Office, the contracting agency, or to the Department of Justice. What we do question, however, is the blanket assertion of this power either by the Attorney General or the Comptroller General without regard to the lawful exercise of the functions committed by statute and by contract to the contracting

officer and to the agency head and his delegate in the resolution and settlement of contract disputes.

Our position is that any settlement of a contract dispute made by the parties under the standard "Disputes" clause, whether or not the result of a decision made at the level of the agency head or his representative (*e.g.*, the Armed Services Board of Contract Appeals), is binding and conclusive on the parties, and not subject to judicial scrutiny, under the Wunderlich Act or otherwise, in the absence of allegations by either party that such a settlement is the result of fraud or bad faith or is beyond the authority of the Government contracting agency to make. *United States* v. *Corliss Steam Engine Co.*, 91 U.S. 321, 23 L.Ed. 397 (1875); *Cannon Construction Company, et al.* v. *United States*, 162 Ct. Cl. 94, 319 F. 2d 173 (1963); *Brock & Blevins Company, Inc.* v. *United States*, 170 Ct. Cl. 52, 343 F. 2d 951 (1965). *Cf. United States* v. *Mason & Hanger Co.*, 260 U.S. 323, 67 L.Ed. 286 (1922). To allege, as have the Comptroller General and the Attorney General, respectively, but independently of each other, that the decision of the Atomic Energy Commission under the standard "Disputes" clause favorable to Petitioner in this case is not supported by substantial evidence and is also erroneous on questions of law, falls considerably short of alleging action by the Atomic Energy Commission beyond its authority with regard to the settlement of contract disputes so as to warrant judicial examination of the matters complained of. For the authority of the Atomic Energy Commission to contract, like that of other agencies of the Government, necessarily includes the power to make settlements of contract disputes

that bind the Government. *United States* v. *Corliss Steam Engine Co., supra; United States* v. *Mason & Hanger Co., supra.*

The Wunderlich Act, as we have shown, does not limit this power to make binding settlements under the standard "Disputes" clause since by its terms it applies only to *decisions* on disputed questions of fact and law that do not ripen into settlements made by the parties because they are unacceptable to the contractor. Such is not the case here as Petitioner has at all times been willing to negotiate with the Contracting Officer of the Atomic Energy Commission to carry out the entitlement decisions of the Atomic Energy Commission favorable to Petitioner. Such negotiations having been frustrated by the actions of the Comptroller General and the Attorney General in breach of Petitioner's contract, Petitioner is thus entitled to reversal of the decision below.

CONCLUSION

In contractual effect the decision of the Atomic Energy Commission favorable to Petitioner's claims of entitlement under the contract "Disputes" clause amounted to a settlement or agreement that this Court should hold is final and binding on the Government, in the absence of fraud, bad faith or illegality on the part of the Atomic Energy Commission in making that settlement or agreement—none of which is alleged below. So viewed, this controversy has no place in the courts on judicial review under the criteria of the Wunderlich Act.

For all the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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APPENDIX A

1. Section 305 of the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U.S.C. § 71 (1964):

> "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

2. The same; Section 304 of the Budget and Accounting Act of 1921, 42 Stat. 24, as amended, 31 U.S.C. § 74 (1964):

> "Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller General of the United States, may, within a year, obtain a revision of the said account by the Comptroller General of the United States, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government. Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement.
>
> "The General Accounting Office shall preserve all accounts which have been finally adjusted, together with all vouchers, certificates, and related papers, until disposed of as provided by law.
>
> "Disbursing officers, or the head of any executive department, or other establishment not under any of

the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement."

3. Liability of Certifying Officers: Section 3 of the Act of Dec. 29, 1941, 31 U.S.C. § 82d (1964):

"The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification."

4. 28 U.S.C. § 516 (1964): *Conduct of litigation reserved to Department of Justice:*

"Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

5. 28 U.S.C. § 519 (1964): *Supervision of litigation:*

"Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties."